Nos. 79-1241 and 79-1250

Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1979

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ASHLAND OIL, INC., PETITIONER

*v.*

PHILLIPS PETROLEUM COMPANY AND
UNITED STATES OF AMERICA

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PHILLIPS PETROLEUM COMPANY, PETITIONER

*v.*

ASHLAND OIL, INC., ET AL.

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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## RESPONSE OF THE UNITED STATES

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## RESPONSE OF THE UNITED STATES

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a)[1] is reported at 607 F. 2d 335. The opinion of the district court (Pet. App. 62a-98a) is reported at 463 F. Supp. 619. The prior opinion of the court of appeals en banc (Pet. App. 8a-42a) is reported at 554 F. 2d 381, cert. denied, 434 U.S. 921, 968. The opinion of the court of appeals

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[1]All references to "Pet. App." are to the appendix filed by petitioner Ashland.

which was withdrawn and superseded by the en banc opinion (Pet. App. 43a-59a) is not reported. The original opinion of the district court (Pet. App. 99a-118a) is reported at 364 F. Supp. 6.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 4a-5a) was entered on October 15, 1979. A timely petition for rehearing was denied on November 14, 1979 (Pet. App. 6a-7a). Ashland's petition for a writ of certiorari was filed on February 11, 1980. Phillips' petition for a writ of certiorari was filed on February 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, on remand, the district court violated the doctrine of the law of the case in determining the proper starting value for use in the work-back method of valuation.

2. Whether, after remand, the court of appeals erred in refusing to award postjudgment interest from the date of the original judgment, which it had set aside on a prior appeal.

3. Whether producer-sellers of natural gas containing helium are entitled to recover from their purchasers the reasonable value of the helium commingled at the wellhead in addition to the contract price.

## STATEMENT

1. Helium is a non-combustible gaseous element that is found in nature intermixed with natural gas. Before 1960 helium was customarily wasted into the atmosphere when natural gas was consumed as fuel; sellers of helium-bearing natural gas customarily sought no separate price for the helium content, considering it to have little or no



value. In 1960 Congress enacted a helium conservation program. Under that program the government contracted with certain companies that agreed to extract helium from natural gas they had acquired and to sell it to the government. The United States agreed to indemnify the companies, above a specified amount, if they were adjudged liable to pay for the helium in addition to payments made under their natural gas contracts.

Ashland, a producer-seller of helium-bearing natural gas, brought this action against Phillips, a buyer of the gas and one of the companies with which the government had contracted, to recover, in addition to the contract price that Phillips had already paid, the reasonable value of the helium contained in the natural gas stream at the wellhead. The government intervened because of its potential liability under the indemnification clause of its contract with Phillips, which provided that the government would pay Phillips, in addition to the base contract price, any amount in excess of about $3.00 per Mcf that Phillips might be required to pay third parties for the helium. Pet. App. 103a.

2. At the first trial of this case, the district court, relying on *Northern Natural Gas Co.* v. *Grounds*, 441 F. 2d 704 (10th Cir.), cert. denied, 404 U.S. 951 (1971), 1063 (1972),[2] held that Ashland was entitled to recover from

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[2]Six of the eight actions which were consolidated for trial in *Grounds* were interpleader actions brought by purchasers of natural gas and sellers of helium other than Phillips to determine the proper distribution of the money paid and to be paid by the United States for the helium. 441 F. 2d at 707, 715. The remaining two actions were class actions on behalf of owner-lessors of the land from which the natural gas was extracted against the United States, in which the United States joined Phillips as a third-party defendant (Phillips was also brought in as a lessee-producer in two of the interpleader actions, but it denied any interest in the fund). 441 F. 2d at 707, 715-716. While the *Grounds* court affirmed the dismissal of the

Phillips the reasonable value at the wellhead of the helium contained in the natural gas stream sold by Ashland to Phillips. Pet. App. 113a. In computing that value, the court employed the "work-back" or "value-less-expense" method, whereby the first known market value of a previously commingled commodity is reduced by the expenses of extracting it, including a fair return to the extractor, in order to reach the value of the commodity prior to extraction. Ashland Pet. 6. In order to fix the starting point, the district judge disregarded the $10.30 per Mcf (thousand cubic feet) contract price between Phillips and the United States because, he found, that price was substantially lower than it would have been had the United States not agreed also to indemnify Phillips for any amounts in excess of about $3.00 which it was required to pay for the helium. Pet. App. 105a. Instead, the court adopted as a starting point the figure of $20.00 per Mcf, which it found to be the fair and reasonable value of Grade A refined (99.9%) helium during the relevant time period. Pet. App. 104a. The court then reduced that figure by Phillips' helium plant costs, including a 10% rate of return to Phillips on its stockholder equity, and by $2.00 per Mcf for purification, and increased it by the value of the natural gas liquids which accrued to Phillips as byproducts of the helium plant operation, to reach a value for commingled helium at the wellhead of from $11.76 to $16.98 per Mcf during the 1963-1972 period. Pet. App. 106a. Judgment in the

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landowners' actions against the United States (441 F. 2d at 715), it held that the lessee-producers were entitled to recover from their purchasers the reasonable value of the commingled helium at the wellhead (441 F. 2d at 723).

This Court denied the petitions for a writ of certiorari filed by the extracting companies (404 U.S. 1063) and the landowners (404 U.S. 951).



amount of $1,402,800.91, including prejudgment interest, and an award of attorney's fees was entered in August, 1973. Pet. App. 117a-118a.

On appeal, a panel of the Court of Appeals for the Tenth Circuit affirmed the district court's determination of liability, employment of the work-back method, and ultimate valuation of the commingled helium at the wellhead. Pet. App. 43a-61a.[3] Thereafter, the opinion of the panel was withdrawn and rehearing en banc was granted.[4]

The en banc court of appeals, as had the panel, affirmed the district court's determination of liability, the work-back method of valuation, and the deduction therein of $2.00 for the treatment of crude helium. Pet. App. 12a-21a.[5] The en banc court, however, set aside the ultimate value which the trial court had reached by the

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[3]The panel reversed the district court's award to Ashland of attorney's fees and its award of one-half of the recovery to Ashland's lessor (from whom Ashland leased the land from which it extracted the natural gas), holding that the proceeds should be divided between lessor and lessee in accordance with the provisions of the lease between them.

[4]The present case was consolidated for en banc hearing with the appeal from *Northern Natural Gas Co.* v. *Grounds*, 393 F. Supp. 949 (D. Kan. 1974), in which, on remand by the Tenth Circuit for a determination of damages, the district court found that the reasonable value of the helium component of the natural gas at the point it was delivered by the lessee-producers was between 60 and 70 cents per Mcf. 393 F. Supp. at 984. *Grounds* was not considered in the en banc opinion rendered in this case, however, and, to date, no decision has been rendered by the court of appeals in *Grounds*.

[5]The en banc court also affirmed the award of prejudgment interest. As had the panel, it reversed the district court's award of attorney's fees and its division of the recovery equally between lessor and lessee.

use of the work-back method for the trial court's further consideration and admission of evidence on

> (1) *the proper starting value*, (2) the amount chargeable to return on investment, (3) the expense properly allocable to production of hydrocarbons, and (4) such other matters, as are pertinent and not foreclosed herein, that bear on the determination of value by the work-back method.

Pet. App. 30a (emphasis added). With respect to the trial court's use of $20.00 per Mcf for the starting figure, the en banc court expressly directed that "[o]n remand the validity of this figure must be examined by the trial court, and a determination made again as to the proper starting value." Pet. App. 21a.

The United States and Phillips each filed a petition for a writ of certiorari, seeking this Court's review, *inter alia*, of the Tenth Circuit's holding that producer-sellers of helium-bearing natural gas were entitled to recover from their purchasers additional compensation for the helium contained in the gas sold. Both petitions were denied. 434 U.S. 921, 968 (1977).

3. On remand, the district court again employed the work-back method of valuation. In doing so, however, it rejected refined helium prices as a starting point, in view of expert testimony that the selected starting point should be as close as possible to the production stage in question (in this case, the helium as commingled with other natural gases at the wellhead), and on the basis of a finding that monopolistic market conditions prevented Grade A refined helium prices from reflecting the product's fair market value. Pet. App. 65a-69a. Finding the crude helium market significantly more competitive than the Grade A market, the district court examined crude helium



prices, including, but not limited to, the United States–Phillips contract price,[6] in comparison with Phillips' actual costs (which, in some cases, had been recomputed in accordance with the directions of the en banc court of appeals) to work back to a value for commingled helium at the wellhead of between $2.50 and $5.50 per Mcf, from which the district court chose $3.00 per Mcf as a single uniform value. Pet. App. 69a-79a. Accordingly, on December 28, 1978, the district court awarded Ashland $218,244 plus interest from that date. Pet. App. 97a-98a.

On appeal, a panel of the Tenth Circuit, noting that the trial court, on remand, "was to determine a proper starting place and value for [the work-back method] * * *" (Pet. App. 2a), affirmed the $3.00 value reached by the district court for the commingled helium at the wellhead. Pet. App. 2a-3a. It reversed the trial court's deletion of prejudgment interest, however, on the ground that the award of prejudgment interest had been approved on the previous appeal, was not in the remand and had become the law of the case. Pet. App. 3a. Finally, the court of appeals denied Ashland's claim for postjudgment interest commencing on the date of the first judgment, rather than at the end of the remand trial, "in view of the extent to which the case was reversed." *Ibid.* Ashland's petition for rehearing and suggestion for rehearing en banc were denied. Pet. App. 6a-7a.

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[6] On remand, the district court also found that Phillips' contract price "represented a fundamentally fair and reasonable price for crude helium" (Pet. App. 71a), which had not been depressed by the inclusion in the contract of the provision for indemnification by the government. Pet. App. 72a-73a.

## DISCUSSION

1. Insofar as Ashland challenges the rulings of the court of appeals on valuation and interest, we submit there is no question warranting review by this Court.

*a.* Ashland contends (Ashland Pet. 12-20) that both the district court and the court of appeals violated the doctrine of the law of the case by holding, after remand, that the value of the commingled helium at the wellhead was $3.00 per Mcf. The short answer to this contention is that the court of appeals did not agree with Ashland that its own prior en banc mandate had been violated by the district court on remand.[7] Indeed, the order denying Ashland's petition for rehearing and suggestion for rehearing en banc recited that "*no member* of the panel nor judge in regular active service on the Court [had] requested that the Court be polled on rehearing en banc." Pet. App. 7a (emphasis added).

Moreover, a comparison between the opinion for the en banc court of appeals and the district court's holding on remand makes clear that the district court in no way contradicted the mandate of the appellate court. The court of appeals did not issue a remand limited solely to "providing documentation concerning the selling price of [Grade A refined] helium." Ashland Pet. 16. Rather, by directing that "[o]n remand the validity of this figure [the $20 refined helium selling price] must be examined by the trial court, and a determination made again as to the proper starting value" for employment of the work-back method (Pet. App. 21a), the court of appeals clearly allowed for the trial court's outright rejection of the

[7]The court of appeals obviously had the doctrine of the law of the case in mind when it rendered the decision in this case, since it reversed the district court's withdrawal of prejudgment interest on that very ground. Pet. App. 3a.



Grade A refined helium prices as the proper starting value.

Nor did the court of appeals eliminate the possibility that the value of the commingled helium at the wellhead might be the same as the Phillips—United States contract price: "[t]his [the contract] payment was not *necessarily* the 'price' of the helium as other considerations were present." Pet. App. 22a (emphasis added). Thus, the appellate court instructed the trial court that the value sought was not the contract price per se. In compliance with the en banc court's instructions, the district court, on remand, considered a range of values in the crude helium market, included in which was the Phillips—United States contract price, in working back to the $3.00 per Mcf value for the helium commingled at the wellhead.

*b.* Ashland also contends (Ashland Pet. 21-26) that the court of appeals' holding that postjudgment interest accrues from the date of the judgment on remand, rather than from the date of the original judgment, presents a conflict with the decisions of other circuits. While the circuits may be in disagreement regarding some aspect of the computation of postjudgment interest under 28 U.S.C. 1961, no such conflict is presented by the facts of the instant case.

On the first appeal of this case, the court of appeals *set aside* the district court's award of $1,402,800.91 as the valuation of helium extracted from 1963 through 1972 plus interest thereon and remanded the case for further hearing on matters bearing on the valuation issue. The court of appeals also reversed the district court's $137,210.00 award of attorney's fees and its award of one-half of the recovery to the lessors. On remand, the district court entered judgment in the amount of $218,244.00 (which was increased on appeal by the addition of

prejudgment interest) and awarded interest from the date of that judgment. The court of appeals affirmed, holding that "under 28 U.S.C. §1961, in view of the extent to which the case was reversed, 'the judgment' for the purpose of interest was that entered by the trial court on remand. *See* Hysell v. Iowa Public Service Co., 559 F. 2d 468 (8th Cir.)." Pet. App. 3a.

The court of appeals was correct in relying on *Hysell* v. *Iowa Public Service Co.*, 559 F. 2d 468 (8th Cir. 1977), in which the Eighth Circuit held that postjudgment interest would be computed not from the date of the first judgment, which had been "expressly vacated on appeal as legally insufficient" (559 F. 2d at 476), but rather from the date of the judgment on remand (which, in *Hysell*, was the same amount as had been awarded initially).

The cases relied on by Ashland are wide of the mark because they do not involve an appellate court's setting aside, or vacating, a judgment and remanding for redetermination of it. The issue presented to, but not decided by, this Court in *Briggs* v. *Pennsylvania R.R.*, 334 U.S. 304 (1948), was whether, upon reversal of a judgment n.o.v., post-judgment interest accrued from the date of the original jury verdict or from the reinstatement thereof on remand. *Louisiana & Ark. Ry.* v. *Pratt*, 142 F. 2d 847 (5th Cir. 1944), *Givens* v. *Missouri-Kan.-Tex. R.R. of Texas*, 196 F. 2d 905 (5th Cir. 1952), and *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 509 F. 2d 784 (5th Cir.), cert. denied, 423 U.S. 833 (1975), also relied on by Ashland, merely answered that question, holding that, in the case of reversal of a



judgment n.o.v., postjudgment interest accrued from the date of the original verdict.[8]

In *Perkins* v. *Standard Oil Company of California*, 487 F. 2d 672 (9th Cir. 1973), on which Ashland also relies, the court of appeals itself reduced the judgment awarded by the district court to a specific amount, thereby, in effect, affirming that part of the final judgment which the district court had awarded.[9]

These distinctions are not mere matters of form, as Ashland asserts (Ashland Pet. 24). It is one thing to recognize interest as accruing from the initial entry of a judgment on a jury verdict which, although set aside, is ultimately reinstated in full on the same grounds on which it was originally entered, or from the entry of a judgment, a part of which, at least, is, in effect, subsequently affirmed. It is a wholly different issue, however, whether to permit the accrual of interest from the entry of a

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[8] In *Briggs* v. *Pennsylvania R.R.*, 164 F. 2d 21 (2d Cir. 1947), the Second Circuit had held that where a judgment n.o.v. is reversed on appeal, postjudgment interest accrues only from the verdict on remand, which holding was not disturbed by this Court's decision in that case. While there thus may be a conflict among the circuits as to when postjudgment interest accrues in the case of reversal of a judgment n.o.v., that is not the present case.

[9] *Premier Corp.* v. *Serrano*, 471 F. Supp. 444 (S.D. Fla. 1979), which followed *Perkins, supra*, involved the additional fact that the court of appeals that vacated the judgment of the trial court "retain[ed] jurisdiction for the purpose of reviewing [the district court's] entrance of findings of fact and conclusions of law * * *." 471 F. Supp. at 445.

Of the remaining cases relied on by Ashland, *Swartzbaugh Manufacturing Co.* v. *United States*, 289 F. 2d 81 (6th Cir. 1961), was not a decision under 28 U.S.C. 1961, and the issue in *In re United States Steel Corporation*, 476 F. 2d 489 (6th Cir.), cert. denied, 414 U.S. 859 (1973), was decided solely on the basis of *Swartzbaugh*, with no mention of Section 1961.

judgment which is set aside on appeal on a ground which has the potential of eliminating any award of damages on remand (for example, in the present case, if, on remand, the district court had determined that the fair market value of crude helium was less than Phillips' costs of extraction). In light of those material distinctions, this case presents a conflict neither with previous decisions of this Court nor with the decisions of the other courts of appeals.

2. In our view, Phillips' petition presents a question more appropriate for consideration by this Court: whether the producer of natural gas is entitled to any additional recovery, over the agreed contract price, in respect of the helium contained in the stream which the purchaser extracted and sold to the government. We continue to believe that the several decisions of the court below (in this and companion cases) on this fundamental issue are erroneous. Nor is the question without importance, considering the substantial monetary consequences for the extracting companies, and, potentially, for the United States, and the possible deterrent effect of the court of appeals ruling on the helium conservation policy. Nevertheless, on balance, we cannot say that the issue urgently calls for this Court's review.

We cannot ignore that the Court, on two recent occasions, denied petitions for a writ of certiorari presenting the issue of liability of natural gas purchasers for the helium content extracted and resold. In this very case, the petition filed by the United States, primarily tendering that question, was denied. Absent a later developing conflict of decisions or other significant intervening event, we would normally eschew a second attempt to press the same issue here. We can point to no such justification at this time.



The present judgment will have minimal financial impact on the government. To be sure, a more generous allowance to the producers in the *Grounds* case, involving very much larger volumes of helium, would subject the United States to a substantial monetary claim. But now forecasting such a result is premature. No doubt, also, the present ruling will tend to increase the price of helium to the government. But the United States is not now purchasing helium, all outstanding contracts having been terminated, and it is not known when, or whether, it will resume that practice.

Of course, the financial impact on the government itself is not the only relevant consideration. Phillips and others are exposed to large claims, and these companies, as well as potential private purchasers of helium, may be deterred from conserving helium if the judgment below stands. But, so long as the formula approved by the court of appeals permits the extracting firms to earn a fair return, it is not clear that the conservation program is imperiled. If the decision of the court of appeals in *Grounds* produces such a result, application to this Court presumably is not foreclosed. At this time, we cannot identify likely consequences of sufficient importance to overcome our reluctance to ask the Court to reconsider its decision not to entertain the case.

## CONCLUSION

The petition for a writ of certiorari in No. 79-1241 should be denied. The United States neither opposes nor supports the petition in No. 79-1250.

Respectfully submitted.

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